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January 20, 1993

EX PARTE OR LATE FILED

Donna R. Searcy
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: **Implementation of the Cable Act of 1992**
MM Dkt. No. 92-259

Dear Ms. Searcy:

After filing the Reply Comments of Cole, Raywid & Braverman in the above-referenced proceeding yesterday afternoon, we discovered that a word processing error caused the precise same text to repeat itself on pages 3 and 9. We are enclosing a substitute original and four copies that delete the duplicating paragraphs. Please substitute these copies for the ones filed yesterday.

Respectfully submitted,

Steven J. Horvitz

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-259
and Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

REPLY COMMENTS OF
COLE, RAYWID & BRAVERMAN

COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, NW
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On behalf of the cable operators and associations listed on the signature page.

January 19, 1993

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SUMMARY

Although must carry and retransmission consent were designed to benefit broadcast television, neither cable operators nor cable susbscribers should be forgotten. Indeed, the Commission's should strive in this proceeding to minimize the implementation burden on cable operators and the disruptive impact on cable subscribers. The Commission will seriously err if it sees its primary objective as restricting operator discretion. Moreover, because it cannot anticipate every implementation problem, the Commission should make clear that it will generously grant interim waivers to protect the status quo.

If retransmission consent is to have any chance of working, the Commission must unequivocally preempt third parties (i.e., programmers and networks) from assuming any control over its exercise. The Commission should also establish a few basic structural rules (e.g., "most favored" status to smaller systems) to mitigate the harmful effects of retransmission consent.

With regard to must carry, the Commission should allow each cable system to designate its television market based on its "principal headend." Finally, the Commission should clarify that broadcaster demands, concerning both channel positioning and VBI carriage, must conform to cable technology.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

REPLY COMMENTS OF
COLE, RAYWID & BRAVERMAN

Cole, Raywid & Braverman, ("CR&B"), on behalf of the cable operators and associations listed below, hereby submits these Reply Comments in the above-referenced proceeding. As the Commission evaluates the record in this proceeding and crafts implementing regulations, it should remember that its paramount duty is to serve the "public interest," not the special interests of the broadcast industry. As NCTA noted in its Comments, "[T]he Commission ought to take care that the interests of cable subscribers are not forgotten . . . ."[1/]

1/ NCTA Comments at 3.

I. THE RULES SHOULD AFFORD LEGITIMATE DISCRETION TO CABLE OPERATORS

In its initial Comments, CR&B asked the Commission to adopt rules for the implementation of must carry and retransmission consent that would minimize the intrusion on each cable operator's editorial discretion. First Amendment considerations require nothing less. Moreover, in practical terms, the cable operator is best suited to make carriage decisions consistent with subscriber interest.

Several Commenters seem determined, nonetheless, to eliminate any operator discretion. The Association of America's Public Television Stations ("APTS"), for example, fears that "broad discretion will be abused."[2/] The problem is illustrated by the controversy surrounding the use of a system's principal headend location to determine its must carry obligations. APTS contends, "[T]he burden of proving the reasonableness of a system's [headend] decision should fall initially on the cable system itself. . . ."[3/] NAB warns that reliance on headend location "would only invite mischief and manipulation in constructing systems."[4/]

2/ APTS Comments at 4.

3/ Id. at 13.

4/ NAB Comments at 9.

Contrary to what some may assert, cable operators do not design and operate their systems with the goal of mistreating broadcasters. The Commission will seriously err if it sees its primary regulatory objective in this proceeding as restricting operator discretion. Hobbling an operator's discretion based on phantom concerns will defeat the Commission's obligation to craft workable must carry/retransmission consent rules that promote the public interest.

CR&B is also troubled by Comments suggesting that the Commission should largely ignore potential implementation difficulties. CBS, for example, discounts the grave problems surrounding retransmission consent by blithely suggesting "the Commission can deal with them as they arise."[5/] NBC instructs the Commission "not to become enmeshed and entrapped" by regulatory details. It concludes, "The Commission should not lose sight of the forest for the trees in this proceeding."[6/] NAB advocates a similar "wait and see" approach.[7/]

CR&B does not seek regulatory micro-management of retransmission consent negotiations. The Commission must make it clear from the start, however, that as problems arise, they will

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5/ CBS Comments at iv.

6/ NBC Comments, at 3-4. See also INTV Comments at 23.

7/ NAB Comments at 2.

be addressed in a manner which protects the status quo and avoids service disruption. Wherever possible, the Commission should devise solutions (both interim and permanent) that limit the administrative and operational burdens on cable operators.

The general indifference displayed by the broadcast Commenters to the plight of the cable operators and cable subscribers is ultimately tempered by the suggestion that the Commission craft interim waivers.[8/] The Commission should embrace that option. If must carry and retransmission consent actually go into effect, implementation problems will surely occur. The Commission should make it clear that, at least initially, temporary waivers will be provided to operators facing such difficulties. Those waivers should protect the status quo, while the Commission considers further refinements to its rules.[9/]

8/ Id. See also NBC Comments at 3 ("[T]he Commission can address the problems or conflicts that arise . . . by whatever procedure may be appropriate to each particular issue."); FOX Comments at 3 ("The preferable course would be to establish a simple, general regulatory scheme, while announcing a special relief program through which anomalous situations created by the new rules may be identified.")

9/ CR&B agrees with NAB that an $800 petition fee would be inappropriate in this area, at least during the initial implementation period. Through no fault of the Commission, a significant number of disputes will likely arise over how the new rules should be interpreted and enforced. It would be unfair to penalize either broadcasters or cable operators who are compelled to seek Commission guidance.

II. THE RULES SHOULD ESTABLISH A PROCEDURAL TIMETABLE THAT MINIMIZES SERVICE DISRUPTION

CR&B and many of the other cable Commenters emphasized the importance of devising a sensible implementation schedule. The Commission can greatly reduce unnecessary service dislocations by giving cable operators the maximum amount of time to rationally respond to the new signal carriage regime. It should, therefore, mandate an early election date, implementation procedures to facilitate prompt communication, and a single effective date for must carry and retransmission consent. CR&B again urges the Commission to consider the schedule set forth in its Comments, and to resist requests that would preclude sensible planning.

The Commission should reject requests that must carry go into effect prior to retransmission consent.[10/] There is no legal or logical basis for a split effective date. Separating the implementation dates for must carry and retransmission consent would have the undesirable effect of increasing service dislocations. To the extent it can, the Commission should structure its rules so that most cable operators will be able to effectuate both must carry and retransmission consent through a one-time change in channel lineup.

10/ See NAB Comments at 43-44.

The Commission would also reject suggestions placing the bulk of analysis, notice, and reporting obligations on cable operators. The burden of implementing must carry and retransmission consent will inevitably fall largely on the cable industry. Placing primary administrative responsibility on cable operators would only add insult to injury. Must carry and retransmission consent were purportedly adopted to protect the broadcast industry, not to penalize the cable industry. The Commission should insist that broadcasters shoulder as much of the administrative burden under the new rules as possible.

III. RETRANSMISSION CONSENT IMPLEMENTATION

A. Broadcast Stations Must Maintain Exclusive Control Over The Granting of Retransmission Consent

Retransmission consent, although roundly hailed by broadcasters, threatens to disrupt existing cable carriage of broadcast stations. As CR&B and others noted in their Comments, there is a serious danger that broadcasters may not be able to control the beast they have created. The Commission must reduce this risk by shoring up the distinction between retransmission consent and copyright.

Section 325(b)(1)(A) provides that cable systems retransmitting the signal of a broadcast station must first secure the consent of the "originating station." If retransmission consent is lawful, it must be entirely separate

from copyright licensing. There is, in fact, general agreement among the Commenters that, in the absence of contractual limitations, a station can grant retransmission consent without authorization from individual copyright holders.

The more difficult question concerns the enforceability of existing or future contract provisions which purport to restrict the exercise of retransmission consent. CR&B joins those advocating that the FCC preempt any contractual restrictions on the exercise of retransmission consent. As Tribune Broadcasting Company explained, "permitting any party to block the retransmission of a signal through contract terms licensing a program would . . . completely frustrate the statutory purpose and render section 6 of the Act [retransmission consent] a virtual nullity."11/

Various networks and programmers argue in their Comments that they should be allowed to address retransmission consent in their agreements with individual broadcasters. They evidently expect the Commission to ignore the adverse consequences such arrangements pose for the viewing options of, and rates paid by, the nation's cable subscribers.

11/ Tribune Broadcasting Comments at 11. See also CATA Comments at 18.

This proceeding would have been the perfect opportunnity for the networks and the programmers to explain how they would exercise the authority they seek, and why the cable industry's fears of substantial service dislocations are unfounded. But the Comments submitted to the Commission by the networks and programmers are conspicuously silent on this point. The precise ramifications of retransmission consent are difficult to predict. It is obvious, however, that its implementation will be greatly complicated if restricted by a web of affiliation agreements and program contracts.

Contrary to the suggestions of certain networks and programmers, CR&B submits that a preemption of retransmission consent restrictions, similar in nature to the regulations now applicable under Section 73.658 of the Commission's rules, is both appropriate and legally justifiable. Programmers clearly have no right to interfere with a station's invocation of "must carry" to secure cable carriage. There is no reason why a different result is required when cable carriage is secured instead through retransmission consent.

B. Retransmission Consent Should Be Administered Minimize Adverse Consequences

The Commission has an obvious interest in avoiding a widespread disruption of established viewing patterns. The statute itself commands the Commission to intercede where demands for

compensation would adversely affect cable rates. 47 U.S.C. § 325(b)(3)(A). CR&B advocates three specific structural measures to minimize the likelihood and severity of adverse consequences:

First, as already explained, the Commission must make clear now that retransmission consent is the exclusive prerogative of broadcast stations. Neither programmers nor networks should be allowed to restrict its exercise.

Second, cable operators must be allowed to make public retransmission consent demands and agreements. Without that ability, broadcasters will be able to unfairly blame any adverse consequences resulting from retransmission consent on cable operators.

Third, smaller systems, with little negotiating leverage, must be granted "most favored" status by Commission proclamation. Operators of those systems, and their subscribers, will otherwise be in a difficult, if not impossible, negotiating position.12/

12/ In its initial Comments, CR&B suggested this automatic "most favored" status for systems serving less than 5% of the households in their television market. CR&B Comments at 38.

IV. MUST CARRY IMPLEMENTATION

A. Channel Positioning Priorities

The commitment of many broadcasters to restrict operator discretion is particularly strong in the matter of channel positioning. The vehemence with which the concern is expressed undoubtedly reflects an underlying uncertainty about how channel positioning claims can be reconciled with cable's fundamental operational restaints. But rhetoric cannot replace logic. The idea that cable operators should have no rights with regard to broadcast channel positioning comports with neither the letter nor the spirit of the governing statute, ignores the operator's legitimate concern with the operations of its business, and would, in practical terms, be an invitation for disaster.

Particularly troubling are suggestions that channel positioning claims should take precedence over every other consideration, including marketing practices dictated by Section 623 of the 1992 Act. It will be difficult, if not impossible, for cable operators to offer a "low cost" basic service (separate and apart from "optional" tier service), unless the operator can impose limitations on the placement of broadcast channels. Cable operators face a host of other bona fide considerations in making channel assignments, including piracy and interference problems. Channel positioning requests must accommodate this reality, rather than vice versa.

In the end, many of the broadcast Commenters seem more interested in exploiting the statute for profit than in protecting channel positioning. NAB, for example, notes, "If a television station's on-air position would cause disruption for the cable service, the operator has the ability to negotiate with the station for another position that would provide mutual benefits."[13/] It hardly serves the public interest to force cable operators to "negotiate" to protect their subscribers.[14/]

B. System Location

One area that attracted considerable attention in the Comments is how a cable system should be "located" for purposes of commercial must carry. Numerous broadasters advocated assigning a system to each market in which it serves subscribers. These broadcast Commenters were untroubled by the burden this approach would impose on cable systems that happen to straddle an ADI boundary.

13/ NAB Comments at 28, n.35.

14/ The problem is well-illustrated by NAB's complaint about a cable system carrying off-air channels 4, 5, 7, and 9 on cable channels 24, 25, 27, and 29. It is hard to imagine a channel assignment that better serves the affected broadcasters. The uniform shift into the "20s" avoids any subscriber confusion, while protecting the signals from possible off-air interference in converterless households. Ironically, the example cited by NAB only confirms that cable operators have typically treated broadcast stations fairly, notwithstanding the absence of must carry or channel positioning requirements.

As suggested in the NPRM, and supported in CR&B's Comments, a cable system should be "located" based on its "principal headend." This would match not only the 1992 Act's treatments for non-commercial stations and "anti-leapfrogging" of commercial networks, but also the Commission's prior must carry regulations.15/

A number of broadcast Commenters argued against the "principal headend" approach primarily out of fear that operators would not honestly identify their principal headend. Again, the Commission should not base these rules on the false premise that a cable operator's sole business objective is to deprive broadcasters of cable carriage. The Commission should adopt the "principal headend" approach and let each operator designate that site.16/ If a broadcaster can show a decision was motivated primarily to deprive a station of carriage rights, it can, of course, petition the Commission for relief.

15/ See 47 U.S.C. §§ 535(1)(2); 534(b)(2)(B); 47 C.F.R. § 76.5(d)(1)(i)(1986).

16/ As noted in our Comments, cable operators should have the option of deviating from the principal headend approach where the majority of system subscribers are situated in a different ADI than is the System's principal headend. See also 47 C.F.R. § 76.5(kk)(1986).

C. Market Changes

Almost all the Commenters expressed concern about relying entirely on Arbitron's changing ADI designation to administer the 1992 Act's new signal carriage requirements. To minimize disruption, most Commenters suggested updating the ADI list only on a triennial basis. CR&B agrees that the triennial approach would help. Nevertheless, it remains concerned that automatically changing designations, even on a triennial basis, could prove disruptive. As suggested in its initial Comments, CR&B believes such changes should be effective for purposes of must carry only after they are reviewed and approved by the Commission.

Several broadcasters suggested in their Comments that the Commission should administer its market redesignation authority in favor of expanding "must carry" zones. Indeed, ABC went so far as to argue that only broadcasters can petition for a market redesignation.[17/] Such suggestions fly in the face of the plain statutory language, lack any logical support, and should be summarily rejected.

CR&B is also troubled by the general disregard for the instruction in the House Report that "This section is not

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17/ ABC Comments at 6. See also INTV Comments at 7; Malrite Comments at 3-4.

intended to permit a cable system to discriminate among several stations licensed to the same community."[18/] The Commission should ordinarily adjust a cable community's market designations based on market circumstances, rather than on a station by station basis.

D. **VBI Carriage**

Carriage issues surrounding the vertical blanking interval ("VBI") also attracted considerable discussion. The Commission must remember that the statute draws a sharp distinction between the carriage of closed caption transmissions and the carriage of other "program-related" material. The latter must be carried only where "technically feasible." 47 U.S.C. §§ 614 (b)(3), 615(g).

NAB's comments recognize the statutory limitation, but then attempt to undermine it. NAB ultimately contends that a cable operator cannot design "new or improved systems that make . . . retransmission [of program related material on the VBI] impossible."[19/] The Commission should look skeptically at any proposal that discourages the development of "new and improved" cable technology. The proposal fails in this case, because it turns a "secondary" right into a "primary" right.

18/ H. Rep. 628, 102d Cong. 2d Sess. at 98.

19/ Id.

Congress clearly stated a broadcaster's VBI transmissions should not dictate cable technology.

The Commission should also be careful that the critical statutory language, limiting mandatory carriage of the VBI to "program-related" material, not be construed so broadly as to render it meaningless. CR&B advocates the interpretation provided by the court in WGN Continental Broadcasting v. United Video, 628 F.2d 622, 626 (7th Cir. 1982). At least in this respect, CR&B supports the statement by APTS that "program related material is material that is integrally as opposed to tangentially-related to the primary programming."[20/]

CONCLUSION

The new must carry/retransmission consent requirements pose substantial burdens on cable operators. The Commission should fashion implementing regulations that recognize the potential problems faced by cable operators and attempt, where possible, to ameliorate these problems.

20/ APTS Comments at 26.

Respectfully submitted,

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Cable Television Association
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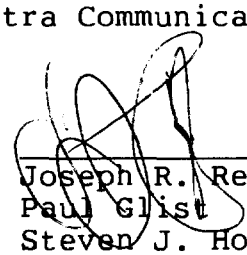
Century Communications Corp.
Columbia International, Inc.
Frederick Cablevision, Inc.
Gilmer Cable Television
Company, Inc.
Greater Media, Inc.
Halcyon Group, Inc.
Helicon Corp.
Jones Intercable, Inc.
KBLCOM Inc.
Monmouth Cablevision Assoc.
MultiVision Cable TV Corp.
OCB Cablevision, Inc.
Rock Associates
TeleCable Corporation
Texas Cable TV Association
West Virginia Cable Television
Association
Zylstra Communications Corporation

By 

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